Supreme Court, U.S.
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No. 92-005

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

RICHARD J. MACKENSWORTH,
Petitioner, Pro Se,

VS.

SEA-LAND SERVICE, INC.,
and UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

RESPONDENT SEA-LAND'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a stay is necessary to preserve appellate jurisdiction in an *in rem* admiralty case?

PARTIES TO THE PROCEEDING

Petitioner: Richard J. Mackensworth

Respondents: Sea-Land Service, Inc.*

United States of America

Other parties below:

SS AMERICAN MERCHANT**

San Francisco Bar Pilots***

Marine Engineers Beneficial Association Pension Trust***

Port Authority of Guam***

Ameron, Inc.***

Kansas Packing Co. of California***

Benito Gonzales***

Hawaii Stevedores, Inc.***

Marine Terminals Corporation***

Masters, Mates & Pilots' Individual Retirement Account***

Continental Illinois National Bank and Trust Co. of Chicago, solely as Trustee for: HFC Leasing Inc., Great American Insurance Co., and the Provident Bank****

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* Pursuant to Sup. Ct. R. 29.1, Sea-Land is a wholly owned subsidiary of CSX Corporation, a Delaware corporation. There are no wholly owned subsidiaries of Sea-Land.

** As this is an admiralty *in rem* action to foreclose maritime liens against a vessel, the vessel SS AMERICAN MERCHANT was a defendant in the district court until it was sold at a judicial foreclosure sale, after which its proceeds of sale became the defendant substitute *res*.

*** Parties who asserted maritime liens against the vessel in the district court who either reached a settlement with Sea-Land on their lien claims, or who dismissed their lien claims.

**** Trustee for owners of the SS AMERICAN MERCHANT who collectively assigned their interest in the vessel to Sea-Land.

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RESPONDENT SEA-LAND'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals dated February 27, 1992, is unreported and is reproduced at Res. App. A-1—A-6. The order of the court of appeals denying rehearing is unreported and is reproduced at Res. App. A-7. The order of the district court dated July 31, 1989, is unreported and reproduced at Res. App. A-8—A-11. The order of the district court dated August 11, 1989, is unreported and reproduced at Res. App. A-12—A-13. The order of the court of appeals denying petitioner Mackensworth's petition for writ of mandamus dated April 3, 1990, is unreported and is reproduced at Res. App. A-23.

JURISDICTION

The judgment of the court of appeals dismissing the appeal was entered on April 28, 1992. Res. App. A-24. The petition for *certiorari* was filed on June 29, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

ADDITIONAL STATUTES AND RULES INVOLVED

RULE C. Action in Rem: Special Provisions

(1) When available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

RULE E. Actions In Rem and Quasi In Rem: General Provisions

(1) Applicability. Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

F.R.C.P. 15(a) provides:

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20

days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

F.R.C.P. 62(d) provides:

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

STATEMENT OF THE CASE

In 1984 petitioner filed a seaman's personal injury claim in the New Jersey District Court, *in rem* against the SS AMERICAN MERCHANT ("Vessel"), and *in personam* against the Vessel's bareboat charterer and his employer, United States Lines, Inc. ("USL").[1] Res. App. A-2. That action was stayed by operation of 11 U.S.C. § 362 when USL filed bankruptcy in 1986. Pet. App. II-3; Res. App. A-2.

In 1987, after obtaining relief from the bankruptcy stay, the United States brought an admiralty action, *in rem*, in the United States District Court for the Northern District of California to foreclose a First Preferred Ship Mortgage it held in the Vessel.

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[1] USL was the Vessel's owner *"pro hac vice."* The legal owner of the Vessel was Continental Illinois National Bank and Trust Co. of Chicago ("CINB") as trustee for the owners, HFC leasing Inc., Great American Insurance Co., and the Provident Bank (collectively "Owners"). Prior to the United States' mortgage foreclosure action, respondent Sea-Land Service, Inc. ("Sea-Land"), had been assigned all ownership rights in the Vessel, including the right to any remnants of the Vessel's proceeds of sale. Res. App. A-2.

Res. App. A-2. The Vessel was thereafter arrested pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supp. Rules"), and sold. *Id.* The sale proceeds of $5,000,000 were deposited in the court's registry as a substitute *res*. *Id.*

A number of parties, including petitioner, were granted relief from the bankruptcy stay to intervene in the California action to assert maritime lien claims. Res. App. A-3. Petitioner's claim in intervention asserted a maritime lien claim for personal injuries alleged to have occurred on board the Vessel on June 13, 1981. Res. App. A-9

In February, 1988, the court entered a default against all persons claiming an interest in the vessel who had failed to file a complaint in intervention against the Vessel. Res. App. A-3. Subsequently, the court granted the United States' motion that it be paid $3,829,950.32 to satisfy its first preferred mortgage claims. Pet. App. I-5. As the full amount of all remaining liens asserted[2] totalled $891,094.45, a surplus of proceeds existed because at least $278,955.23, plus accruing interest, would have remained in the registry of the court even if all the lien claims alleged were paid in full. Pet. App. I-2; Res. App. A-3.

Petitioner Mackensworth moved to enjoin various parties, including respondent Sea-Land, from defending against his and other intervenors' claims, asserting that they had waived their right to defend such claims by virtue of the language in their respective Verified Claims and averments to the United States' complaint. Pet. App. II-1—II-5. The court held that no such waivers had occurred and that there was no defect in the parties' appearances. *Id.*; Res. App. A-6.

Petitioner Mackensworth also moved under Federal Rule of Civil Procedure 18(a) to "join" a wholly different and discrete personal injury claim with his pending complaint in intervention. Res. App. A-9—A10. This motion was treated by the court as a motion for leave to add, by amendment, a new claim under

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[2] Including petitioner Mackensworth's lien claim in the amount of $44,000. Pet. 13; Pet. App. II-2.

Federal Rule of Civil Procedure 15(a). The court found the new claim to be *prima facie* time barred under 46 U.S.C. § 763a, and denied the motion because the amendment would have been futile. *Id.*

On Sea-Land's motion the court ordered that petitioner's complaint in intervention be transferred to the Southern District of New York, along with substitute security in the full amount of petitioner's pending lien claim, plus interest and costs.[3] Res. App. A-3, A-10—A-11. After all claims of the other maritime lienors were dismissed or settled and paid pursuant to the court's distribution orders, Sea-Land was granted final distribution of the entire remnants of the proceeds of the Vessel's sale. Res. App. A-3—A-4.

Petitioner objected to the district court's denial of his motion to add a new claim, and the order fixing the substitute security for his action, by petitioning for mandamus. His petition was denied. Res. App. 23. Petitioner also appealed the disbursement order paying the United States' mortgage claim, but later voluntarily dismissed that appeal. Res. App. A-5. While petitioner made informal oral objections to some of the district court's orders disbursing portions of the *res*, he did not seek or even mention a stay of any of the orders. Res. App. A-4—A-5. In the meantime, the district court ordered disbursements of the *res* to eleven parties, over a two year period, and then made its final order distributing the remnants of the *res* to Sea-Land on August 1, 1990. Res. App. A-4—A-5.

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[3] In connection with providing adequate substitute security pursuant to Supp. Rule E(5)(a) Sea-Land proposed: (1) that Mackensworth's claim, which fell within the cover of USL's insurance, subject to a per claim deductible, be tendered to USL's insurers by delivering to USL's insurers the remaining deductible amount ($18,000) from the proceeds of the Vessel's sale; and (2) that the transfer order be conditioned on USL's insurers posting a letter of undertaking, or other suitable security in an amount to be set by the court, to serve as substitute security for the *res*. The district court adopted this proposal. Res. App. A-10—A-22. It is notable that the letter of undertaking posted is convertible to a bond upon demand of the petitioner. Res. App. A-18 ¶¶ 2 & 3.

None of the *res* remains in the registry of the Northern District of California and all lien claimants have been satisfied, transferred with security, or dismissed. A substitute *res* in the amount of petitioner's original lien claim, plus interest and costs, secures his action in the transferee district. Res. App. A-3, A5; Pet. 13; Pet. App. II-2.

SUMMARY OF ARGUMENT

Maritime lien foreclosure actions must be brought under federal admiralty jurisdiction against the vessel *in rem*. Admiralty *in rem* jurisdiction fails if the vessel *res*, or a substitute *res*, is released or distributed by the district court.

Although it is far from clear, petitioner appears to seek *certiorari* on two points, both of which are moot.

First, petitioner appears to object to the district court's denial of his request to add to his existing lien claim an additional maritime lien claim, arising out of wholly different facts and circumstances. The district court found that the additional claim was *prima facie* time barred and denied the request.

Second, petitioner also appears to object to the court approved substitute security posted to secure his original maritime lien claim pursuant to Supp. Rule E(5)(a). The district court ordered the petitioner's original lien claim and substitute security therefor transferred to a more convenient district. Petitioner does not oppose the transfer. Petitioner appears to limit his objection to nature[4] and amount[5] of the substitute security approved to accompany the transfer.

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[4] Petitioner complains that the letter of undertaking is not a bond, but as pointed out in note 3, *supra*., the letter is convertible to a bond upon demand.

[5] As far as can be discerned, petitioner's only grievances regarding the amount of the security are (1) that it does not cover the time barred claim which he was not permitted to add, and (2) it is not twice the amount of his claim.

After the district court entered its orders, petitioner sought mandamus, which was denied. Both of the objections raised in the petition for *certiorari* are moot, because petitioner failed to request a stay of the district court's orders which completely distributed the balance of the *res* over a two-year period. With the exception of the substitute security transferred with petitioner's original maritime claim, no *res* remains on which to predicate jurisdiction or to provide the petitioner with the relief he seeks, and for these reasons the petition for *certiorari* should be denied.

REASONS FOR DENYING THE WRIT

I

AFTER THE DISTRICT COURT COMPLETELY DISTRIBUTED THE *RES*, JURISDICTION IN THIS *IN REM* ADMIRALTY ACTION CEASED TO EXIST.

In rem jurisdiction derives entirely from the court's control over the defendant *res*. *Pennington v. Fourth Nat'l. Bank*, 243 U.S. 269, 272 (1917). This case would present the question of what effect a district court's release or complete disbursement of the *res* has on jurisdiction an *in rem* admiralty action. This is not a novel question. The circuit courts which have directly considered this question in an admiralty context have held that when the court has released or completely disbursed the *res*, *in rem* jurisdiction is destroyed. *L.B. Harvey Marine, Inc. v. M/V RIVER ARC*, 712 F.2d 458, 459 (11th Cir. 1983); *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361, 1362 (11th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983); *Bank of New Orleans v. Marine Credit Corp.*, 583 F.2d 1063, 1067 (8th Cir. 1978); *Am. Bank of Wage Claims v. Registry of District Court of Guam*, 431 F.2d 1215, 1218 (9th Cir. 1970); *Parks v. B.F. Leaman & Sons, Inc.*, 279 F.2d 529, 532 (5th Cir. 1960); *Hamburg-Am. Line v. United States*, 1948 A.M.C. 888, 896 (1st Cir. 1948); *The DENNY*, 127 F.2d 404, 407 (3rd Cir. 1942); *Canal Steel Works, Inc. v. One Drag Line Barge*, 48 F.2d 212, 213 (5th Cir. 1931), *cert. denied*, 284 U.S. 647 (1931).

In American admiralty law it has long been recognized that the vessel is considered to be a separate legal entity, capable of suing

and being sued *in rem* for maritime obligations and torts. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 224 (1945). Over the years this legal fiction of "personifying" the vessel has been the subject of some criticism, particularly when attempts have been made to extend the doctrine beyond its traditional scope.[6] However, this Court has recognized that the fiction had real cause for its existence when created, and that it can still be very useful in the maritime context for the purpose of allowing actions against a vessel when its owner cannot be reached for suit. *Continental Grain Co., supra*, 364 U.S. at 23.[7]

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[6] This Court has refused to extend the fiction to the land based concept of *forum non conveniens*, *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 23-24 (1960); or where it would unduly narrow the scope of an Act of Congress. *See e.g., The CITY OF NORWICH (Place v. Norwich & N.Y. Transp. Co.)*, 118 U.S. 468, 503 (1886) (interpreting The Limitation Act, 46 U.S.C. § 183, 184); *Consumers Import Co. v. Kabushiki Kaishi Kawasaki Zosenjo*, 320 U.S. 249, 253 (1943) (interpreting The Fire Statute, 46 U.S.C. § 182).

[7] While four circuits have recently held that *in rem* jurisdiction is not destroyed when the *res* in a civil forfeiture action leaves the district, they have done so for reasons which are inapplicable to *in rem* admiralty cases. These circuits justify the departure from the traditional rule by the rationale that the United States submits to *in personam* jurisdiction by initiating the forfeiture, and because the admiralty rule of 'no *res*, no jurisdiction' is inappropriate in the context of civil forfeitures. *United States v. $12,390*, 956 F.2d 801, 804 (8th Cir. 1992) (distinguishing *Bank of New Orleans, supra*); *United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417, 1419 (1st Cir. 1991); *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991); *United States v. $95,945.18 United States Currency*, 913 F.2d 1106, 1109 (4th Cir. 1990). The Third Circuit avoided the issue by holding in the context of a currency forfeiture case that the *res* was an obligation of the Treasury, present everywhere in the United States. *United States v. $1,322,242.58*, 938 F.2d 433, 437-38 (3rd Cir. 1991). This Court has granted *certiorari* in a civil forfeiture case to consider the question of whether a stay or bond is necessary to preserve appellate jurisdiction. *Republic Nat'l. Bank of Miami v. United States*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted*, 112 S.Ct. 1159 (Feb. 24, 1992).

Indeed, in the present case the bareboat charterer of the Vessel filed for bankruptcy protection and could not have been effectively sued *in personam*. Nor could the Vessel's true owner be sued *in personam* in this case, since all the claims asserted in the action occurred while the Vessel was in the hands of the bareboat charterer, USL. *The BARNSTABLE*, 181 U.S. 464, 468 (1901). It was the existence of this admiralty fiction of personification which made it possible for the maritime lien claimants, including petitioner, to assert and pursue their claims against the Vessel *in rem* while its bareboat charterer was subject to bankruptcy proceedings. Without this admiralty fiction, petitioner would not have a pending secured maritime lien claim.

In admiralty *in rem* cases the only exception to the 'no *res*, no jurisdiction' rule which is recognized, at least in principle, is where the *res* is removed from the jurisdiction by "an accidental or fraudulent or improper removal." *The RIO GRANDE*, 90 U.S. (23 Wall.) 458, 465 (1874); *see also Platoro, Ltd. v. Unidentified Remains of a Vessel*, 508 F.2d 1113, 1116 (5th Cir. 1975); *Am. Bank of Wage Claims, supra*, 431 F.2d at 1218.

Petitioner may not seek to resurrect jurisdiction in this case by relying on this exception. Here, as in *American Bank*, the exception is inapplicable because there is no evidence of any accident, fraud or impropriety in distribution of the *res*. All disbursements in this case were made pursuant to the district court's orders.[8]

A party objecting to release or disbursement of the *res* in an *in rem* admiralty action must seek a stay of the district court's orders concerning the *res* to preserve the jurisdiction necessary to assert appellate rights.[9] *Taylor, supra*, 683 F.2d at 1362; *Bank of New*

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[8] It is important to note that 'improper' in this context "does not mean error by the district court." *Stevedoring Servs. of Am. v. Ancora Transp.*, 884 F.2d 1250, 1253 (9th Cir. 1989). Rather, it means improper in the sense that the appellant was "defrauded." *Id.*

[9] Federal Rule of Civil Procedure 62(d) provides a means for appellants to obtain a stay of execution upon the posting of a supersedeas bond. "The purpose of requiring a supersedeas bond is to secure an appellee from loss resulting from the stay of execution." *Lamon v. City of Shawnee, Kan.*, 758 F. Supp. 654, 655 (D.Kan. 1991) (quoting

Orleans, supra, 583 F.2d at 1069; *Am. Bank of Wage Claims, supra*, 431 F.2d at 1218. In this case, petitioner's total failure to request a stay of execution of the distribution orders of which he complains, and the absence of any *res* in the district, renders his appeal moot, and mandates denial of his petition to this Court. Unlike civil forfeiture cases, where the government is the party whose possession of the *res* is being challenged, in admiralty cases the *res*, as here, is usually distributed to a wide variety of maritime lien claimants hailing from various locales. The rule accordingly has natural justification in admiralty because of the substantial, if not insurmountable, difficulty of tracing and recouping the distributed *res*. Res. App. A-5, n.3.

In the instant case the *res* was completely disbursed pursuant to the district court's orders and nothing remains of the *res* upon which jurisdiction may be predicated. Accordingly, the petition for *certiorari* should be denied.

Miami Int'l Realty Co. v. Paynter, 807 F.2d 871, 873 (10th Cir. 1986)). A supersedeas bond, however, is not a prerequisite to obtaining a stay of execution. The District Court has the discretion to order a stay of execution without the posting of a supersedeas bond. *Olympia Equip. v. W. Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986); *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 873 (10th Cir. 1986); *Fed. Prescription Serv. v. Am. Pharmaceutical Ass'n.*, 636 F.2d 755, 757-758 (D.C. Cir. 1980); *Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979); *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 193 (9th Cir. 1977). Here, the petitioner made no effort whatsoever to request a stay of execution. Res. App. A-4.

II

PETITIONER'S MISUNDERSTANDING OF THE LAW DOES NOT WARRANT GRANTING *CERTIORARI.*

A. The Quantum of Security Mandated By Supplemental Rule E(5)(a).

Petitioner also appears to seek review of the substitute security which accompanied the transfer of his action to another district under 28 U.S.C. § 1404(a). While petitioner does not object to the transfer itself, Pet. 18; Pet. App. III-5—III-6; he does appear to object to both the nature (a letter of undertaking) and amount ($44,000) of security the district court ordered to be posted pursuant to Supp. Rule E(5)(a) as a condition of the transfer. Pet. 19; Res. App. A-10, A-12—A-13, A-18.

Petitioner's misstatements of law regarding the adequacy of the substitute security do not warrant the grant of *certiorari*. Supp. Rule E(5)(a) accords the district court the discretion to approve the nature of the security taking the place of the *res*, and, within certain specified guidelines, to fix the amount of that security. *See* 7A J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ E.13[1], at E-603 — E-604 (2d ed. 1992) [hereinafter Moore's]. The Rule requires the district court to fix the principal sum of the security in an amount sufficient to cover the plaintiff's claim, fairly stated, with accrued interest and costs. *Id.* The letter of undertaking posted in this case fulfills these requirements. Pet. 13; Pet. App. II-2.; Res. App. A-3, A-18 ¶ 1.

The district court's discretion under Rule E(5)(a) is limited to the extent that the amount fixed for security may not exceed the lesser of twice the value of the plaintiff's claim, or the appraised value of the *res*. However, Rule E(5)(a) does not, as petitioner suggests, mandate that the district court set the security to be twice the value of his claim. *See* Moore's, *supra*. The personal injury claim which petitioner was held entitled to assert was secured by a letter of undertaking approved by the district court. Res. App. A-12—A-13. Letters of undertaking are well known and accepted means of posting security under Supp. Rule E(5)(a). Res. App. A-3, n.2; *See generally* Schoenbaum, *Admiralty and Maritime Law*, § 20-3, at p. 621, n. 12 (1987) [herein-

after Schoenbaum]. Moreover, petitioner is empowered by the letter of undertaking in this case to demand of the insurers who issued the letter that they file a bond to replace the letter of undertaking. Res. App. A-18 ¶ 2 & 3. Petitioner's original claim, fairly stated, is adequately secured under Supp. Rule E(5)(a). Pet. 13; Pet. App. II-2; Res. App. A-3, A-5.

B. Maritime Lien Priorities.

Throughout these proceedings petitioner has labored under the mistaken assumption that a maritime lien for a seaman's personal injury claim must always be paid before any other competing maritime or ship mortgage lien, because of its "superior priority." Pet. 12. He contends that the district court's failure to accord his lien the "highest priority," and to require that his claim be paid or settled first, before any other distributions of the substitute *res*, warrants review by this Court. However, it is hornbook law that priority among competing maritime lien claims does not become an issue unless the total potential value of the competing maritime lien claims, fairly stated, exceeds the total value of the *res*. Schoenbaum, § 8-6, at p. 263; Gilmore & Black, *The Law of Admiralty*, p. 734 (2nd ed. 1975).

In this case, the total value of all maritime liens asserted against the Vessel amounted to $891,094.45, and when combined with the United States ship mortgage claim of $3,829,950.32, the total of all lien claims as alleged amounted to $4,721,044.77. Res. App. A-3. Since the total of all lien claims asserted was less than the $5,000,000 sale proceeds, lien priorities were never in issue. Pet. App. I-2; Res. App. A-3.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

JOHN A. EDGINTON*
RUPERT P. HANSEN, JR.
JONI BRANDVOLD
GRAHAM & JAMES
One Maritime Plaza
Suite 300
San Francisco, California 94111
Telephone: (415) 954-0200
Attorneys for Respondent
Sea-Land Service, Inc.

* Counsel of Record

FILED
FEB 27, 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,
SEA-LAND SERVICE, INC.
Claimant-Appellee,

vs.

S.S. AMERICAN MERCHANT (Official No. 457288),
her engines, boilers, tackle, apparel, appurtenances,
furnishings, etc., *in rem*, etc.,
Defendant.

vs.

RICHARD J. MACKENSWORTH
Plaintiff-intervenor-Appellant

No. 90-16412
D.C. No. CV-87-04888-SC

MEMORANDUM*

Appeal from the United States District Court
Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted January 14, 1992
San Francisco, California

Before: GOODWIN, FLETCHER, and BRUNETTI,
Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit execpt as provided by Circuit Rule 36-3.

OVERVIEW

Richard Mackensworth, intervenor-appellant, appeals pro se the district court's distribution of the vessel sale proceeds in an action by the United States to foreclose a first preferred ship mortgage on the vessel. Mackensworth's intervention arose from alleged maritime personal injuries. He also appeals the transfer of his personal injury action to the Southern District of New York and various interlocutory orders made during distribution of the vessel's proceeds.

FACTS AND PROCEDURAL HISTORY

On June 12, 1984, Appellant Mackensworth filed a personal injury claim against United States Lines (USL),[1] the charterer of the SS American Merchant (Vessel) and employer of Mackensworth, *in personam*, and against the Vessel, *in rem*, in the District of New Jersey. When USL filed a Chapter 11 bankruptcy petition on November 24, 1986, Mackensworth's claim was stayed.

On September 23, 1987, the United States subsequently brought an admiralty action *in rem* in the United States District Court for the Northern District of California to foreclose a First Preferred Ship Mortgage it held in the Vessel. The Vessel thereafter was arrested by the United States Marshal, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, and sold. The proceeds of the sale were then deposited in the district court's registry as a substitute *res*.

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[1] The Vessel was under a "bareboat" charter, or lease, to USL who thus acted as the owner "*pro hac vice*." Legal title to the vessel was held by Continental Illinois National Bank and Trust Co. of Chicago as trustee for the owners, HFC Leasing Inc., Great American Insurance Co., and the Provident Bank. Prior to the commencement of the United States' mortgage foreclosure action, Sea-Land Services, Inc. (Sea-Land) had been granted the right to purchase the Vessel. It was assigned all of the ownership rights, including any and all of the ultimate recovery of the judicial sale of the Vessel.

Mackensworth, as well as the other maritime lien claimants, ultimately was granted relief from the bankruptcy stay and permitted to intervene in the admiralty action in the District Court of Northern California by filing an action against the Vessel, *in rem*. Mackensworth intervened on December 17, 1987.

On February 22, 1988, after previously having given notice of its intent to do so, the district court entered a default against all persons claiming an interest in the Vessel who failed to file a complaint in intervention against the Vessel. The total claims against the Vessel filed by all intervenors amounted to $891,094.45 and the proceeds from the Vessel's sale amounted to 5 million, leaving an excess of $3,829,050.32. Based on the fact that a surplus existed for the intervenors, the district court disbursed approximately 3.8 million dollars to the United States on July 29, 1988 in partial satisfaction of its claim. On June 8, 1990, the district court ordered entry of final judgment in favor of the United States pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and ordered a disbursement to the United States in final satisfaction of its remaining claims not resolved by the first disbursement.

Finally, Sea-Land moved for the final distribution of the entire remnants of the last of the proceeds of the Vessel because no claimants to the Vessel remained in the district court. On August 11, 1989, Mackensworth's claim had been transferred to the Southern District of New York after Sea-Land posted a substitute security[2] covering the full amount of the claim Mackensworth had asserted. The remaining intervenors' claims had been satisfied from the Vessel's proceeds. On July 16, 1990, the court

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[2] Letters of Undertaking traditionally have been used in admiralty as a means of securing release from arrest of a vessel or its proceeds of sale. *See Alyeska Pipeline Serv. Co. v. Vessel Bay Bridge*, 703 F.2d 381, 384 (9th Cir. 1983), *cert. dismissed by*, 467 U.S. 1247 (1984); *J.K. Welding Co. v. Gotham Marine Corp.* 47 F.2d 332 (S.D.N.Y. 1931). The stipulation for value or other security is substituted for the vessel or vessel's proceeds and becomes the *res* subject to the court's jurisdiction. Fed. R. Civ. P. E(5) (Supplemental Rules for Admiralty and Maritime Claims).

entered its Final Order for Distribution on August 1, 1990, and ordered the entire remaining sale proceeds disbursed to Sea-Land. None of the res remains in the registry of the Northern District of California.

Mackensworth filed this appeal on October 1, 1990.

ANALYSIS

I. *Standard of Review.*

This court exercises its independent judgment with respect to questions of appellate jurisdiction, *Pride Shipping Corp. v. Tafu Lumber Co.*, 898 F.2d 1404, 1406 (9th Cir. 1990), and must dismiss the suit whenever it lacks jurisdiction. *Billingsley v. Commissioner*, 868 F.2d 1081 (9th Cir. 1989).

II. *Jurisdiction.*

It is well settled that *in rem* jurisdiction exists only where the subject matter of the action, or an appropriate substitute thereof, is within the jurisdiction of the court in which the action lies. *American Bank of Wage Claims v. Registry of the Dist. Court of Guam*, 431 F.2d 1215, 1218 (9th Cir. 1970). This principle applies in admiralty actions. *Id.* The release or complete disbursal of the vessel or substitute *res* destroys subject matter jurisdiction and renders moot any appeal concerning the *res*. *Id.; Alyeska Pipeline*, 703 F.2d at 384; *Pride Shipping*, 898 F.2d at 1408; *Stevedoring Servs. of Am. v. Ancora Transport, N.V.*, 941 F.2d 1378, 1382 (9th Cir. 1991) (court lost jurisdiction over a Rule B maritime attachment when the plaintiff failed to obtain a stay of execution of the judgment before the district court properly released the security).

In this case, the proceeds of the Vessel, deposited in the district court's registry, acted as the substitute *res*. *See American Bank*, 431 F.2d at 1218. When the proceeds were distributed to the various parties, leaving nothing in the district court's registry, the *in rem* jurisdiction was destroyed. Mackensworth never attempted to stay the distribution of any of the proceeds. Although he did make informal oral objections to the disbursements made to the

United States during two separate hearings, he never moved for or even mentioned a stay. Although he made one attempt at appealing the July 29, 1988 interlocutory disbursement order to the United States, he voluntarily dismissed the appeal when the district court refused to certify the appeal pursuant to 28 U.S.C. § 1292.

Under an exception to the prevailing rule, the release or disbursement of the *res* will not terminate jurisdiction if the *res* is released accidentally, fraudulently, or improperly. *Pride Shipping*, 898 F.2d at 1409; *Farwest Steel Corp. v. Barge Sea-Span 241*, 769 F.2d 620, 621 (9th Cir. 1985); *American Bank*, 431 F.2d at 1219. *Stevedoring*, 941 F.2d at 1382. It is clear that the district court did not release the res accidentally or fraudulently. All disbursements were made pursuant to the court's orders. It is also clear that the district court did not release the res improperly. As discussed above, the court disbursed the funds pursuant to the legitimate, settled claims of the United States and other maritime lienors. Its final disbursement to Sea-Land was made after it determined it no longer had any claimants before it. *See Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (clearly erroneous standard of review applies to factual findings on jurisdictional issues). Thus we cannot rely on the exception to support our jurisdiction and must dismiss this appeal.[3] We note that Mackensworth has not been harmed by the district court's proceedings. If he should prevail fully on his personal injury claim in the District Court of New York, there is an adequate monetary fund from which to satisfy his injury.

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[3] Mackenworth's suggestion that we "recall" the disbursements made by the district court and "make the *res* reappear" already has been rejected emphatically in our circuit. *See American Bank*, 431 F.2d at 1219. The district court ordered disbursements of the *res* to eleven parties over a two-year period. This court would be forced to trace, identify, recover, and then redistribute the disbursed funds—a time-consuming endeavor, and one brought on by Mackenworth's failure to seek a stay of any of the disbursements.

III. *Remaining Interlocutory Orders.*

We note that even if we had jurisdiction over this appeal, we would not be able to review the district court's transfer of Mackensworth's claim to the Southern District of New York. The decision in the transferee court is not yet final. The rule in this circuit is clear: transfer orders under 28 U.S.C. § 1404(a) are not appealable until final judgment has been rendered in the transferee district. *In Re Kemble*, 776 F.2d 802, 806 (9th Cir. 1985); *Kasey v. Molybdenum*, 408 F.2d 16, 18 (9th Cir. 1969). The proper avenue for review of transfer orders under § 1404(a) is by a writ of mandamus. *American Fidelity Fire Ins. v. United States Dist. Court*, 538 F.2d 1371, 1374 (9th Cir. 1976). Nor will we construe this appeal as a writ of mandamus. Mackensworth already has sought a writ of mandamus regarding this transfer order which we denied as being without error in an Order filed April 3, 1990.

Likewise, we cannot review the district court's denial of Mackensworth's Motion to Enjoin USL and Sea-Land from defending against his complaint in intervention, filed on November 7, 1988, or his Motion to Amend a Complaint, submitted as a Motion to Join a Complaint, filed on July 10, 1989. The district court's denials of each motion are interlocutory and therefore not appealable. 28 U.S.C. § 1292.

DISMISSED.

FILED
APR 1, 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

SEA-LAND SERVICE, INC.
Claimant-Appellee,

vs.

S.S. AMERICAN MERCHANT (Official No. 457288), her engines, boilers, tackle, apparel, appurtenances, furnishings, etc., *in rem*, etc.,
Defendant.

vs.

RICHARD J. MACKENSWORTH
Plaintiff-intervenor-Appellant

No. 90-16412
D.C. No. CV-87-04888-SC

ORDER

Before: GOODWIN, FLETCHER, and BRUNETTI, Circuit Judges.

Appellant's petition for rehearing is denied.

FILED
JUL 31, 1989
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. C 87 4888 SC

UNITED STATES OF AMERICA,
Plaintiff,

and

RICHARD J. MACKENSWORTH,
Plaintiff in Intervention,

v.

S.S. AMERICAN MERCHANT et al.,
Defendants.

ORDER DENYING MOTION TO AMEND AND GRANTING MOTION TO TRANSFER

This action comes before the court on two matters: plaintiff-in-intervention Richard J. Mackensworth ("Mackensworth"), appearing *pro se*, seeks to "join" a claim to his original complaint, pursuant to Fed. R. Civ. P. 18(a); and claimants Sea-Land Service, Inc. and United States Lines, Inc. ("Claimants") seek to transfer Mackensworth's intervention action *in rem* to the United States District Court for either the District of New Jersey or the Southern District of New York. Such transfer would be contingent upon the posting into the Registry of this Court a letter of undertaking by U.S. Lines' protection and indemnity underwriters, The United Kingdom Mutual Steam Ship Mutual Assurance Association (Bermuda) Limited (the "U.K. P&I Club"). Such letter of undertaking would serve as substitute security for the *res* in this action, i.e., the vessel's proceeds of sale, pursuant to

Rule E(5)(a) of the Supplemental Rules For Certain Admiralty and Maritime Claims.

1. *Mackensworth's Motion*

Mackensworth seeks to "join" a claim for respiratory system ailments allegedly caused by environmental toxics inhaled while he worked on the SS American Merchant. Mackensworth claims that his alleged respiratory injury manifested itself by December 31, 1982, "more than six years ago". Mackensworth's Claim By Joinder, at 6:3-5.

The Court shall treat Mackensworth's "joinder" motion as a motion to amend, pursuant to Fed. R. Civ. P. 15(a). Rule 18(a) deals only with pleading requirements, and does not treat substantively whether a party may amend his original complaint to include new claims. *See* Rule 18 Advisory Committee notes.

The Court finds that leave to amend is not warranted here, because Mackensworth's proposed amendment would be futile. *See California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987); *Sackett v. Beaman*, 399 F.2d 884 (9th Cir. 1968) (futility is adequate grounds upon which to deny a motion to amend). Mackensworth's proposed amendment, a claim alleging respiratory system injuries caused by environmental toxics aboard the SS American Merchant, is a claim which Mackensworth admits manifested itself by December 31, 1982, "more than six years ago." Mackensworth's Claim By Joinder, at 6:3-5. This claim is barred on its face by the applicable three-year statute of limitations found in 46 U.S.C. § 763(a).

This proposed amendment would not "relate back" to the original complaint, as it does not arise out of the same "conduct, transaction, or occurrence set forth in the original pleading" as required by Fed. R. Civ. P. 15(c). Mackensworth's original complaint alleges injuries from one discreet incident—back injuries which allegedly stem from his loading of paint cans on the vessel on June 13, 1981. Therefore, as the proposed amendment would be barred by the statute of limitations, the Court declines

to grant Mackensworth leave to amend his complaint to add this new claim.

2. *U.S. Lines/Sea-Lands Service Motion to Transfer*

Claimants seek to transfer Mackensworth's complaint in intervention to the United States District Court for the District of New Jersey, or, in the alternative, to the Southern District of New York, pursuant to 28 U.S.C. § 1404(a). Mackensworth does not object to a transfer to the Southern District of New York.

The Court finds that several factors counsel transfer of this matter to the Southern District of New York. Mackensworth resides in New York, and U.S. Lines' files, trial exhibits, and its corporate counsel are all located in New York. Moreover, the witnesses which U.S. Lines intends to use reside in New York. The Southern District of New York is clearly a more convenient forum for the parties and witnesses to this action.

This lawsuit was originally brought in the Northern District of California simply because the subject vessel was at the time in this district. The vessel has since been sold, with the proceeds of sale deposited in the Court's Registry. The Court finds that good cause exists to transfer this *in rem* claim. *See Continental Grain Company v. Barge FBL-585*, 364 U.S. 19 (1960); *In re International Marine Towing, Inc.*, 617 F.2d 362 (5th Cir. 1980).

The Court orders that this transfer be contingent upon the posting into the Registry of this Court a letter of undertaking by U.S. Lines' protection and indemnity underwriters U.K. P&I Club, which letter of undertaking shall be subject to the approval of this Court and shall be in substantially the form of that suggested by Claimants. *See* Exhibit A, Lambert Declaration in Support of Joint Motion. Such letter of undertaking shall serve as the substitute security for the *res* in this action, i.e., the vessel's proceeds of sale, pursuant to Rule E(5)(a) of the Supplemental Rules For Certain Admiralty and Maritime Claims. The posting of this letter of undertaking shall coincide with the next rollover date of the certificates of deposit held in the Registry of this Court. At that time, in exchange for said letter of undertaking being posted, $18,000 of the vessel sale proceeds shall be paid to

Transport Mutual Services, Inc., as agents on behalf of the U.S. P&I Club.

In accordance with the foregoing, IT IS HEREBY ORDERED that:

(1) Mackensworth's motion to amend is denied; and

(2) Mackensworth's complaint-in-intervention is transferred to the district court for the Southern District of New York, contingent upon the posting of an appropriate letter of undertaking.

SO ORDERED.

Dated: July 31, 1989

Samuel C. Conti /s/
Samuel C. Conti
United States District Judge

FILED
AUG. 11, 1989
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RECEIVED
AUG 11, 1989
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

and

RICHARD J. MACKENSWORTH,
Plaintiff in Intervention,

v.

S.S. AMERICAN MERCHANT (Official No. 547288), her engines, boilers, tackles, apparel, furnishings and appurtenances, etc., *in rem*, et al.,
Defendants.

No. C 87 4888 SC

ORDER CONCERNING TRANSFER OF ACTION

WHEREAS Claimants Sea-Land Service, Inc. and United States Lines, Inc., debtor and debtor-in-possession, have caused an appropriate Letter of Undertaking to be posted into the Registry of this Court, in compliance with this Court's July 31, 1989 Order on their Joint Motion, it is therefore

ORDERED, that the Clerk of this Court is instructed to pay to Transport Mutual Services, Inc., as correspondent for the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, the sum of $18,000 from the Proceeds of the judicial sale ("Proceeds") of the defendant vessel S.S. AMERICAN MERCHANT on the August 14, 1989 roll-over date of the Certificates of Deposit in the Registry of this Court containing said Proceeds; and it is further

ORDERED, that in connection herewith, the Clerk is instructed to notify Counsel submitting this Order when the check with said $18,000 payment is available, so he may promptly collect the same for transmission to Transport Mutual Services, Inc.; and it is therefore further

ORDERED, that the contingency in this Court's July 31, 1989 Order is now held satisfied, and the Clerk of this Court is instructed to effect the transfer of intervenor Richard Mackensworth's action to the Southern District of New York forthwith.

Dated: August 11, 1989

Samuel C. Conti /s/
Samuel C. Conti
JUDGE OF THE UNITED STATES
DISTRICT COURT

Submitted By:

GRAHAM & JAMES
JOHN A. EDGINTON
RUPERT P. HANSEN
Telephone: (415) 954-0361

By Rupert P. Hansen /s/
Rupert P. Hansen
Attorneys for Claimant
Sea-Land Service, Inc.

FILED
AUG 11, 1989
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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Attorneys for Claimant
Sea-Land Service, Inc.

No. C 87 4888 SC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

and

RICHARD J. MACKENSWORTH,
Plaintiff in Intervention,

v.

S.S. AMERICAN MERCHANT (Official No. 547288), her engines, boilers, tackle, apparel, furnishings and appurtenances, etc., *in rem*, et al.,
Defendants.

CERTIFICATE OF COMPLIANCE RE CONDITION FOR TRANSFER OF ACTION

I, Rupert P. Hansen, certify:

1. That I am an attorney licensed to practice before this Court, and am associated with the law firm of Graham & James, counsel for Claimant Sea-Land Service, Inc. ("Sea-Land"). I

have personal knowledge of and could competently testify to all matters stated herein, except for those matters stated to be based on information and belief.

2. That attached to this Certificate as Exhibit "1" is an original Letter of Undertaking, binding on the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited ("U.K. Club"), which is the P&I Club Underwriter of Claimant United States Lines, Inc., debtor and debtor-in-possession and former bareboat charterer ("USL") of the defendant vessel, the S.S. AMERICAN MERCHANT (the "Vessel").

3. Said Letter of Undertaking is submitted in compliance with this Court's Order of July 31, 1989, to serve as the substitute security for the *res, i.e.,* the Vessel's proceeds of sale ("Proceeds"), pursuant to Rule E(5)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims, in respect of plaintiff-in-intervention Richard Mackensworth's action herein.

4. I am informed by the Clerk of this Court, and believe, that August 14, 1989 is the next roll-over date of the Certificates of Deposit containing the Proceeds held in the Registry of this Court. Said Letter of Undertaking is dated August 14, 1989, to coincide with the next rollover date of the Certificates of Deposit containing the Proceeds.

5. Said Letter of Undertaking is in substantially the same form as that suggested by Claimants Sea-Land Service, Inc. and USL in Exhibit "A" to Michael C. Lambert's Declaration filed in this action June 30, 1989 (*see,* Exhibit 2 hereto). The only changes are as follows:

In Paragraph No. "1":

". . . not exceeding the amount claimed in your complaint in intervention . . ." has been changed to ". . . not exceeding the $44,000 amount claimed in your complaint in intervention . . ."

and

". . . District of New Jersey . . ." has been changed to ". . . Southern District of New York . . ."

In the Concluding Paragraph:

". . . the signing of this letter by Transport Mutual Services, Inc., as agent, shall not be construed as binding upon Transport Mutual Services, Inc., . . ." has been changed to ". . . the execution of this letter by Mr. David W. Martowski shall not be construed as binding upon him personally, nor binding upon Transport Mutual Services, Inc. . . ."

I certify under penalty of perjury that the foregoing is true and correct and this Certification was executed by me on August 11, 1989, at San Francisco, California.

Rupert P. Hansen /s/

Rupert P. Hansen

EXHIBIT 1

Transport Mutual Services Inc.
21 West Street
New York, New York 10006/2908 (212) 514-8500
Telecopier: (212) 509-7929 • Telex TRT 177713/175957 • FTCC 824048 • TMSNY
Cable Address TRANMUTUAL, NEW YORK

Miami, FL Office
15045 N.W. 7th Avenue
Miami, Florida 33168/3109
(305) 685-0101
Telecopier: (305) 688-7271
Telex: 1561563 TMSM UT

San Francisco, CA Office
111 Pine Street, Suite 1550
San Francisco, CA 94111/3409
(415) 956-6537
Telecopier: (415) 956-0685
Telex: 823-267 TMS SF US

August 14, 1989

Mr. Richard Mackensworth
35-15 Leverich Street
Jackson Heights, NY 11372

RE: RICHARD MACKENSWORTH

v.

S.S. AMERICAN MERCHANT
Civil No. C-87-4888-SC (N.D. Cal.)
Alleged Injury On Board
S.S. AMERICAN MERCHANT—June 13, 1981

Dear Mr. Mackensworth:

In consideration for the release of the lien that you have asserted against the proceeds from the sale of the defendant vessel S.S. AMERICAN MERCHANT presently held in the registry of the United States District Court for the Northern District of California arising out of the alleged injury that you claim to have suffered as a result of an incident on board the S.S. AMERICAN MERCHANT on or about June 13, 1981 (the "*Incident*"), the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited ("*Association*") hereby agrees as follows:

1. In the event a final judgment (after all appeals, if any) is entered in your favor against the S.S. AMERICAN MERCHANT and/or her Owner(s) or former Bareboat charterer as a result of the Incident, the Association agrees to pay and satisfy such final judgment up to and not exceeding the $44,000 amount claimed in your complaint in intervention in the above referenced action, plus interest and costs, or any lesser amount adjudged by the United States District Court for either the Northern District of California or the Southern District of New York ("*Courts*") or agreed upon between the parties without final judgment being rendered.

2. Upon demand, the Association shall cause to be filed a bond in form and sufficiency of surety satisfactory to you or to either of the Courts in accordance with the provisions of Rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure securing your *in rem* claim against the AMERICAN MERCHANT in the above referenced action.

3. In the event the bond referred to under paragraph 2 above is filed, the undersigned Association shall have no further obligation under paragraph 1 above.

This letter is written entirely without prejudice as to any rights, defenses, immunities or limitations, statutory, contractual or otherwise, which the vessel or her Owner(s) or former Bareboat Charterer may have, none of which are to be regarded as waived and all of which are hereby reserved. The giving of this Letter of Undertaking is not to be construed as an admission of liability.

It is the intent of this Undertaking that your rights and the rights of the defendant vessel S.S. AMERICAN MERCHANT and her Owner(s) and former Bareboat Charterer shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the S.S. AMERICAN MERCHANT remained under arrest and the proceeds from the sale of such vessel remained on deposit with either of the Courts or had the arrest been lifted by the posting of a bond.

It is understood and agreed that the execution of this letter by Mr. David M. Martowski shall not be construed as binding upon him personally, nor binding upon Transport Mutual Services, Inc., but is to be binding only upon The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited.

Very truly yours,

TRANSPORT MUTUAL SERVICES, INC.

By: David W. Martowski /s/

David W. Martowski
President

As Correspondent for the United Kingdom
Mutual Steam Ship Assurance Association
(Bermuda) Limited

EXHIBIT 2

TRANSPORT MUTUAL SERVICES, INC.
21 West Street
New York, New York 10004

June , 1989

Mr. Richard Mackensworth
35-15 Leverich Street
Jackson Heights, New York 11372

RE: RICHARD MACKENSWORTH

v.

S.S. AMERICAN MERCHANT
Civil No. C-87-4888-SC (N.D. Cal.)
Alleged Injury On Board
S.S. AMERICAN MERCHANT—June 13, 1981

Dear Mr. Mackensworth:

In consideration for the release of the lien that you have asserted against the proceeds from the sale of the defendant vessel S.S. AMERICAN MERCHANT presently held in the registry of the United States District Court for the Northern District of California arising out of the alleged injury that you claim to have suffered as a result of an incident on board the S.S. AMERICAN MERCHANT on or about June 13, 1981 (the "*Incident*"), the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited ("*Association*") hereby agrees as follows:

1. In the event a final judgment (after all appeals, if any) is entered in your favor against the S.S. AMERICAN MERCHANT and/or her Owner(s) or former Bareboat Charterer as a result of the Incident, the Association agrees to pay and satisfy such final judgment up to and not exceeding the amount claimed in your complaint in intervention in the above referenced action, plus interest and costs, or any lesser amount adjudged by the United States District Court for either the Northern District of California or the District

of New Jersey ("*Courts*") or agreed upon between the parties without final judgment being rendered.

2. Upon demand, the Association shall cause to be filed a bond in form and sufficiency of surety satisfactory to you or to either of the Courts in accordance with the provisions of Rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure securing your *in rem* claim against the AMERICAN MERCHANT in the above-referenced action.

3. In the event the bond referred to under paragraph 2 above is filed, the undersigned Association shall have no further obligation under paragraph 1 above.

This letter is written entirely without prejudice as to any rights, defenses, immunities or limitations, statutory, contractual or otherwise, which the vessel or her Owner(s) or former Bareboat Charterer may have, none of which are to be regarded as waived and all of which are hereby reserved. The giving of this Letter of Undertaking is not to be construed as an admission of liability.

It is the intent of this Undertaking that your rights and the rights of the defendant vessel S.S. AMERICAN MERCHANT and her Owner(s) and former Bareboat Charterer shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the S.S. AMERICAN MERCHANT remained under arrest and the proceeds from the sale of such vessel remained on deposit with either of the Courts or had the arrest been lifted by the posting of a bond.

It is understood and agreed that the signing of this letter by Transport Mutual Services, Inc., as agent, shall not be construed as binding upon Transport Mutual Services, Inc., but is to be binding upon The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited.

Very truly yours,

TRANSPORT MUTUAL SERVICES, INC.

By: _____

As Correspondent for the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited

FILED
APR 2, 1990
CATHY A. CATTERSON CLERK, U.S.
COURT OF APPEALS
NINTH CIRCUIT

FILED
APR 3, 1990
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-70115

RICHARD J. MACKENSWORTH,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

UNITED STATES OF AMERICA, et al.,
Real Parties in Interest.

DC# CV-87-4888-SC
Northern California (San Francisco)

ORDER

Before: WALLACE, SNEED, and LEAVY, Circuit Judges

The petition for writ of mandamus is denied. *See Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977).

FILED
APR 28, 1992
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 90-16412

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

SEA-LAND SERVICE, INC.
Claimant-Appellee

v.

S. S. AMERICAN MERCHANT, (Official No.457288), her engines, boilers, tackle, apparel, appurtenances, furnishings, etc., in rem, etc.,
Defendant

v.

RICHARD J. MACKENSWORTH,
Plaintiff-intervenor-Appellant

CT/AG# CV-87-04888-SC

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal from the judgment of the said District Court in this cause be, and hereby is DISMISSED.

Filed and entered 2/27/92.